

Kentucky Department of Education Special Education Procedures Manual

November, 2000

The Kentucky Department of Education (KDE) is required to comply with all the regulations of the Individuals with Disabilities Education Act (IDEA) as found in 34 C.F.R. Part 300. Specifically, KDE must comply with the requirements contained in 34 C.F.R. Part 300.121-300.156 and 34 C.F.R. 300.600 which requires KDE to ensure that the requirements of the federal regulations are carried out. This Manual contains the federal requirements that KDE shall follow, in addition to any applicable state statutes or regulations, in administering its special education programs. The majority of state regulations that pertain to special education programs in local school districts are contained in 707 KAR 1:280 through 707 KAR 1:380.

Personnel standards

KDE shall have internal operating procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of IDEA are appropriately and adequately prepared and trained. These procedures will provide for the establishment and maintenance of standards that are consistent with all state approved or recognized certification, licensing, registration, or other comparable requirements that apply to the profession or discipline in which a person is providing special education or related services. KDE will determine the specific occupational categories required to provide special education and related services and revise or expand those categories as needed.

To the extent that a state standard for a profession or discipline, including standards for temporary or emergency certification, are not based on the highest requirements in the state applicable to a specific profession or discipline, KDE will provide the steps the state is taking and the procedures for notifying public agencies and personnel of those steps and the timelines it has established for the retraining or hiring of personnel to meet appropriate professional requirements in the state.

A determination will be made about the status of personnel standards in the state. That determination will be based on current information that accurately describes, for each profession or discipline in which personnel are providing special education and related services, whether the applicable standards are consistent with the highest requirement in the state for that profession or discipline. This information will be kept on file and made available to the public.

KDE will allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with state law (KRS 161.044), regulations or written policy, in meeting the requirements of IDEA to be used to assist in the provision of special education and related services.

KDE will have a mechanism for serving children with disabilities if instructional needs exceed available personnel who meet appropriate professional requirements in the state for a specific profession or discipline. If there continues to be a shortage of qualified personnel, KDE will address those shortages in its comprehensive system of personnel development. (34 C.F.R. 300.136)

Performance goals and indicators

KDE will establish goals for the performance of children with disabilities in the state that are consistent with the purpose of IDEA as stated in federal regulations and are consistent, to the maximum extent appropriate, with other goals and standards for all children established by the state. KDE will establish performance indicators that the state will use to assess progress toward achieving those goals that, at a minimum, address the performance of children with disabilities on assessments, dropout rates, and graduation rates. Every two years, KDE will report to the Secretary of the U.S. Department of Education (Secretary) and the public on the progress of the state, toward meeting these goals. KDE will revise its state improvement plan as may be needed to improve its performance based on an assessment of that report. (34 C.F.R. 300.137)

Participation in assessments

KDE will ensure that all children with disabilities are included in the statewide assessment system pursuant to applicable state laws and regulations. This will include children with disabilities who will participate in alternate assessments. (34 C.F.R. 300.138)

Reports relating to assessments

KDE will make available the following information to the public, and report to the public with the same frequency and in the same detail as it reports on the assessment of nondisabled children: 1) the number of children with disabilities participating in regular assessments and alternate assessments; and 2) the performance results of the children with disabilities (if doing so would be statistically sound and would not result in disclosure of performance results identifiable to individual children) on regular assessments and alternate assessments. These reports to the public will include aggregated data that include the performance of children with disabilities together with all other children and disaggregated data on the performance of children with disabilities. (34 C.F.R. 300.139)

SEA responsibility for general supervision

KDE will perform its general supervisory responsibilities to ensure all requirements of IDEA are carried out and that all educational programs for children with disabilities administered in the state are under the general supervision of KDE and meet the education standards of KDE. In order to perform its general supervision responsibilities, KDE will ensure that all applicable federal and state laws and regulations are followed. (34 C.F.R. 300.141)

Methods for ensuring services

KDE will participate in any interagency agreement or other mechanism for interagency coordination that is in effect between any noneducational public agency and KDE in order to ensure that all services described below that are needed to ensure FAPE is provided, including the provision of these services during the pendency of any disputes among the agencies.

This agreement or other mechanism will include the following: 1) an identification of, or a method for defining, the financial responsibility of each agency for providing services (that are considered special education or related services that are necessary for ensuring FAPE) to ensure FAPE to children with disabilities. The financial responsibility of each noneducational agency, including the state Medicaid agency and other public insurers of children with disabilities, must precede the financial responsibility of the LEA or the state agency responsible for developing the child's IEP; 2) the conditions, terms, and procedures under which an LEA must be reimbursed by other agencies; 3) procedures for resolving interagency disputes (including procedures under which LEAs may initiate proceedings) under the agreement or other mechanism to secure reimbursement from other agencies or otherwise implement the provisions of the agreement or mechanism; and 4) policies and procedures for agencies to determine and identify the interagency coordination and timely and appropriate delivery of services to ensure FAPE.

If any public agency other than an educational agency is otherwise obligated under Federal or state law, or assigned responsibility under state policy or through an agreement or other mechanism described above, to provide or pay for services that are considered special education or related services that are necessary for ensuring FAPE to children with disabilities in the state, the public agency shall fulfill that obligation or responsibility, either directly or through contract or other arrangement. A noneducational public agency may not disqualify an eligible service for Medicaid reimbursement because that service is provided in a school context.

If a LEA or state agency responsible for developing the child's IEP had to provide or pay for services under 707 KAR 1:290, Section 1 (4) due to the failure of a

noneducational public agency to meet its obligations, the LEA or state agency may then claim reimbursement for the services from the noneducational public agency that failed to provide or pay for these services and that agency shall reimburse the LEA or state agency in accordance with the terms of the interagency agreement or other mechanism described above.

In accordance with KRS 205.520 and 907 KAR 1:715, Kentucky must administer its Medicaid program pursuant to “any regulation that may be imposed ...by federal law.” Therefore, KDE will notify LEAs of the following information which is required by 34 C.F.R. 300.142 concerning public and private insurance:

- 1) A LEA may use the Medicaid or other public insurance benefits programs in which a child participates to provide or pay for services required under IDEA, as permitted under the public insurance program except for the following exceptions;
- 2) With regard to services required to provide FAPE to an eligible child, the LEA:
 - a) may not require parents to sign up for or enroll in public insurance programs in order for their child to receive FAPE;
 - b) may not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to IDEA, however, the LEA may pay the cost that the parent otherwise would be required to pay; and
 - c) may not use a child’s benefits under a public insurance program if that use would decrease available lifetime coverage or any other insured benefit, result in the family paying for services that would otherwise be covered by the public insurance program and that are required for the child outside the time the child is in school, increase premiums or lead to the discontinuation of insurance, or risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures;
- 3) With regard to services required to provide FAPE to an eligible child, a LEA may access a parent’s private insurance proceeds only if the parent provides informed consent consistent with 707 KAR 1:340, Section 4;
- 4) Each time the LEA proposes to access the parent’s private insurance proceeds it must:
 - a) obtain parental consent in accordance with 707 KAR 1:340, Section 4; and
 - b) inform the parents that their refusal to permit the LEA to access their private insurance does not relieve the LEA of its responsibility to ensure that all required services are provided at no cost to the parents.
- 5) If a LEA is unable to obtain parental consent to use the parent’s private insurance, or public insurance when the parent would incur a cost for a specified services required under IDEA, to ensure FAPE the LEA may use its Part B funds to pay for the services;

- 6) To avoid financial cost to parents who otherwise would consent to use private insurance, or public insurance if the parent would incur a cost, the LEA may use its Part B funds to pay the cost the parents otherwise would have to pay to use the parent's insurance (e.g., the deductible or co-pay amounts);
- 7) Proceeds from public or private insurance will not be treated as program income for purposes of 34 C.F.R. Part 80.25;
- 8) If a LEA spends reimbursement from Federal funds (e.g., Medicaid) for services under this part, those funds will not be considered "State or local" funds for purpose of the maintenance of effort provisions of IDEA; and
- 9) Nothing in IDEA should be construed to alter the requirements imposed on a State Medicaid agency, or any other agency administering a public insurance program by Federal statute, regulations or policy under title XIX, or title XXI of the Social Security Act, or any other public insurance program. (34 C.F.R. 300.142)

Hearings relating to LEA eligibility

KDE will not make any final determination that an LEA is not eligible for assistance under Part B of IDEA without first giving the LEA reasonable notice and an opportunity under KRS Chapter 13B for a hearing. (34 C.F.R. 300.144)

Suspension and expulsion rates

KDE will examine data to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities among LEAs in the state or compared to the rates for nondisabled children within the agencies. If discrepancies are occurring, KDE will review and, if appropriate, revise (or require the agency to revise) its policies, procedures, and practices relating to the development and implementation of IEPs, the use of behavioral interventions, and procedural safeguards, to ensure that these policies, procedures, and practices comply with IDEA. (34 C.F.R. 300.146)

Public participation

KDE will ensure that prior to the adoption of any policies and procedures needed to comply with IDEA, there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities. KDE will ensure that this public participation is subjected to a public review and comment process that is required by the state for other purposes and is comparable to or consistent with the following:

- 1) KDE shall provide adequate notice to the general public of the public hearings;
- 2) The notice must be in sufficient detail to inform the general public about:
 - a) the purpose and scope of the state policies and procedures and their relation to IDEA;

- b) the availability of the state policies and procedures;
 - c) the date, time, and location of the public hearings;
 - d) the procedures for submitting written comments about the policies and procedures; and
 - e) the timetable for submitting the policies and procedures to the Secretary for approval;
- 3) The notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify the general public about the hearings and enough in advance of the date of the hearings to afford interested parties throughout the state a reasonable opportunity to participate.

KDE shall conduct the public hearings at times and places that afford interested parties throughout the state a reasonable opportunity to participate. The policies and procedures must be available for comment for a period of at least 30 days following the date of the notice mentioned above. Before adopting the policies and procedures, KDE will review and consider all public comments and make any necessary modification to those policies and procedures. After the Secretary approves a state's policies and procedures, KDE will give notice in newspapers or other media, or both, that the policies and procedures are approved. The notice will name the places throughout the state where the policies and procedures are available for access by any interested person. (34 C.F.R. 300.148)

State advisory panel

KDE will work with the Governor's office to establish and maintain an advisory panel for the purpose of providing policy guidance with respect to special education and related services for children with disabilities in the state. The membership of the panel will be representative of the state population and will be composed of individuals involved in, or concerned with the education of children with disabilities including; parents of children with disabilities, individuals with disabilities, teachers, representatives of institutions of higher education that prepare special education and related services personnel, state and local education officials, administrators of programs for children with disabilities, representative of other state agencies involved in the financing or delivery of related services to children with disabilities, representatives of private schools, at least one representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities, and representatives from the state juvenile and adult corrections agencies. A majority of the members of the panel will be individuals with disabilities or parents of children with disabilities.

The functions of the state advisory panel will be:

- 1) Advise KDE of unmet needs within the state in the education of children with disabilities;

- 2) Comment publicly on any rules or regulations proposed by KDE regarding the education of children with disabilities;
- 3) Advise KDE in developing evaluations and reporting on data to the Secretary;
- 4) Advise KDE in developing corrective action plans to address findings identified in Federal monitoring reports under IDEA;
- 5) Advise KDE in developing and implementing policies relating to the coordination of services for children with disabilities; and
- 6) Advise on the education of eligible students with disabilities who have been convicted as adults and incarcerated in adult prisons, even if a state assigns general supervision responsibility for those students to a public agency other than KDE.

The procedures for the state advisory panel will be:

- 1) To meet as often as is necessary to conduct its business;
- 2) By July 1 of each year, the panel shall submit an annual report of panel activities and suggestions to KDE. This report must be made available to the public in a manner consistent with other public reporting requirements of IDEA;
- 3) Official minutes must be kept on all panel meetings and must be made available to the public on request;
- 4) All advisory panel meetings and agenda items must be announced enough in advance of the meetings to afford interested parties a reasonable opportunity to attend. Meetings must be open to the public;
- 5) Interpreters and other necessary services must be provided at panel meetings for panel members or participants. KDE will pay for these services and may use its Part B funds; and
- 6) The advisory panel shall serve without compensation but KDE will reimburse the panel for reasonable and necessary expenses for attending meetings and performing duties. KDE may use its Part B funds for these expenses. (34 C.F.R. 300.150)

Prohibition against commingling

KDE will not commingle funds under Part B of IDEA with state funds. KDE will use a separate accounting system that includes an audit trail of the expenditures of Part B funds. (34 C.F.R. 300.152)

State-level supplanting

KDE will use funds received under Part B to supplement the level of Federal, state, and local funds (including funds that are not under the direct control of KDE) expended for special education and related services provided to children with disabilities under Part B of IDEA and in no case to supplant these Federal, state and local funds. (34 C.F.R. 300.153)

Maintenance of state financial support

KDE will not reduce the amount of state financial support for special education and related services for children with disabilities below the amount of that support for the preceding fiscal year. (34 C.F.R. 300.154)

Policies and procedures for use of Part B funds

KDE will ensure that funds paid to the state under Part B of IDEA are spent in accordance with the provisions of IDEA. (34 C.F.R. 300.155)

Annual description of use of Part B funds

KDE will describe annually how it will retain funds for state-level activities to be used to meet the requirements of IDEA, how those amounts will be allocated among those activities to meet state priorities based on input from LEAs, and the percentage of those amounts, if any, that will be distributed to LEAs by formula. In general, KDE uses Part B funds for the following purposes:

1. distribution to LEAs;
2. state administration and implementation of the Comprehensive System of Personnel Development;
3. direct and support services (e.g., through Special Education Cooperatives and Regional Training Centers, including training, technical assistance, and direct services and public information); and
4. training and technical assistance for parents and children with disabilities. (34 C.F.R. 300.156)

Comprehensive system of personnel development, General CSPD requirements

KDE shall have in effect a comprehensive system of personnel development that is designed to ensure an adequate supply of qualified special education, regular education and related services personnel. KDE will develop and implement a comprehensive system of personnel development that is consistent with the purposes of IDEA through the activities contained in the State Improvement Grant. (34 C.F.R. 300.135) (34 C.F.R. 300.380)

Mediation

KDE will establish and implement procedures to allow parties with disputes involving identification, evaluation, or the educational placement of children with disabilities to resolve those disputes through a mediation process. The procedures contained in 707 KAR 1:340, Section 6 shall apply to the process. KDE will maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special

education and related services. A person who otherwise qualifies as a mediator will not be an employee of KDE solely because he or she is paid by KDE to serve as a mediator. KDE will provide training to the mediators including the following items: 1) an agreement reached by the parties to the dispute in the mediation process must be set forth in a written mediation agreement, and 2) discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding and the parties to the mediation process will be required to sign a confidentiality pledge prior to the commencement of the process. (34 C.F.R. 300.506)

Impartial due process hearing; parent notice. Impartial hearing officer. Hearing rights. Finality of decision; appeal; impartial review. Timelines and convenience of hearings and reviews. Civil action. Attorneys' fees.

KDE will ensure that due process hearings requested under 707 KAR 1:340, Section 5 and 7 shall be conducted pursuant to KRS Chapter 13B and IDEA requirements contained in 34 C.F.R. Part 300.507 through 300.514. As stated in KRS 13B.020(4) "any administrative hearing or portion thereof may be certified as exempt by the Attorney General based on the following criteria (a) the provision of this chapter conflict with any provision of federal law or regulation with which the agency must comply..." In situations where there is a conflict between KRS 13B and the federal regulations, the federal provisions will take precedence.

Below is the entire text from KRS Chapter 13B with the relevant federal regulations inserted as appropriate. KDE will ensure that all hearing officers are trained in these procedures as well as 34 C.F.R. 300.523 through 300.526.

13B.005 Short title for KRS 13B.005 to 13B.170.

KRS 13B.005 to 13B.170 shall be named the Albert Jones Act of 1994.

13B.010 Definitions for chapter.

As used in this chapter, unless the context requires otherwise:

- (1) "Administrative agency" or "agency" means each state board, bureau, cabinet, commission, department, authority, officer, or other entity in the executive branch of state government authorized by law to conduct administrative hearings.
- (2) "Administrative hearing" or "hearing" means any type of formal adjudicatory proceeding conducted by an agency as required or permitted by statute or regulation to adjudicate the legal rights, duties, privileges, or immunities of a named person.
- (3) "Party" means:
 - (a) The named person whose legal rights, duties, privileges, or immunities are being adjudicated in the administrative hearing;
 - (b) Any other person who is duly granted intervention in an administrative hearing; and

- (c) Any agency named as a party to the adjudicatory proceeding or entitled or permitted by the law being enforced to participate fully in the administrative hearing.
- (4) "Agency head" means the individual or collegial body in an agency that is responsible for entry of a final order.
- (5) "Recommended order" means the whole or part of a preliminary hearing report to an agency head for the disposition of an administrative hearing.
- (6) "Final order" means the whole or part of the final disposition of an administrative hearing, whenever made effective by an agency head, whether affirmative, negative, injunctive, declaratory, agreed, or imperative in form.
- (7) "Hearing officer" means the individual, duly qualified and employed pursuant to this chapter, assigned by an agency head as presiding officer for an administrative hearing or the presiding member of the agency head.
- (8) "Division" means the Division of Administrative Hearings in the Office of the Attorney General created pursuant to KRS 15.111.

13B.020 Application of chapter -- Exemptions.

- (1) The provisions of this chapter shall apply to all administrative hearings conducted by an agency, with the exception of those specifically exempted under this section. The provisions of this chapter shall supersede any other provisions of the Kentucky Revised Statutes and administrative regulations, unless exempted under this section, to the extent these other provisions are duplicative or in conflict. This chapter creates only procedural rights and shall not be construed to confer upon any person a right to hearing not expressly provided by law.
- (2) The provisions of this chapter shall not apply to:
 - (a) Investigations, hearings to determine probable cause, or any other type of information gathering or fact finding activities;
 - (b) Public hearings required in KRS Chapter 13A for the promulgation of administrative regulations;
 - (c) Any other public hearing conducted by an administrative agency which is nonadjudicatory in nature and the primary purpose of which is to seek public input on public policy making;
 - (d) Military adjudicatory proceedings conducted in accordance with KRS Chapter 35;
 - (e) Administrative hearings conducted by the legislative and judicial branches of state government;
 - (f) Administrative hearings conducted by any city, county, urban-county, charter county, or special district contained in KRS Chapters 65 to 109, or any other unit of local government operating strictly in a local jurisdictional capacity;
 - (g) Informal hearings which are part of a multilevel hearing process that affords an administrative hearing at some point in the hearing process if the procedures for informal hearings are approved and promulgated in accordance with subsections (4) and (5) of this section;

- (h) Limited exemptions granted for specific hearing provisions and denoted by reference in the text of the applicable statutes or administrative regulations;
 - (i) Administrative hearings exempted pursuant to subsection (3) of this section;
 - (j) Administrative hearings exempted, in whole or in part, pursuant to subsections (4) and (5) of this section; and
 - (k) Any administrative hearing which was commenced but not completed prior to July 15, 1996.
- (3) The following administrative hearings are exempt from application of this chapter in compliance with 1994 Ky. Acts ch. 382, sec. 19:
- (a) Finance and Administration Cabinet
 - 1. Higher Education Assistance Authority
 - a. Wage garnishment hearings conducted under authority of 20 U.S.C. sec. 1095a and 34 C.F.R. sec. 682.410
 - b. Offset hearings conducted under authority of 31 U.S.C. sec. 3720A and sec. 3716, and 34 C.F.R. sec. 30.33
 - (b) Cabinet for Health Services
 - 1. Office of Certificate of Need
 - a. Certificate-of-need hearings and licensure conducted under authority of KRS Chapter 216B
 - b. Licensure revocation hearings conducted under authority of KRS Chapter 216B
 - (c) Cabinet for Families and Children
 - 1. Department for Community Based Services
 - a. Supervised placement revocation hearings conducted under authority of KRS Chapter 630
 - 2. Department for Disability Determination Services
 - a. Disability determination hearings conducted under authority of 20 C.F.R. sec. 404
 - (d) Justice Cabinet
 - 1. Department of State Police
 - a. State Police Trial Board disciplinary hearings conducted under authority of KRS Chapter 16
 - 2. Department of Corrections
 - a. Parole Board hearings conducted under authority of KRS Chapter 439
 - b. Prison adjustment committee hearings conducted under authority of KRS Chapter 197
 - c. Prison grievance committee hearings conducted under authority of KRS Chapters 196 and 197
 - 3. Department of Juvenile Justice
 - a. Supervised placement revocation hearings conducted under KRS Chapter 635
 - (e) Labor Cabinet
 - 1. Department of Workers' Claims

- a. Workers' compensation hearings conducted under authority of KRS Chapter 342
- (f) Natural Resources and Environmental Protection Cabinet
 - 1. Department for Surface Mining Reclamation and Enforcement
 - a. Surface mining hearings conducted under authority of KRS Chapter 350
 - 2. Department for Environmental Protection
 - a. Wild River hearings conducted under authority of KRS Chapter 146
 - b. Water resources hearings conducted under authority of KRS Chapter 151
 - c. Water plant operator and water well driller hearings conducted under authority of KRS Chapter 223
 - d. Environmental protection hearings conducted under authority of KRS Chapter 224
- (g) Kentucky Occupational Safety and Health Review Commission
 - 1. Occupational safety and health hearings conducted under authority of KRS Chapter 338
- (h) Public Protection and Regulation Cabinet
 - 1. Board of Claims
 - a. Liability hearings conducted under authority of KRS Chapter 44
 - 2. Public Service Commission
 - a. Utility hearings conducted under authority of KRS Chapters 74, 278, and 279
- (i) Cabinet for Workforce Development
 - 1. Department for Employment Services
 - a. Unemployment Insurance hearings conducted under authority of KRS Chapter 341
- (j) Secretary of State
 - 1. Registry of Election Finance
 - a. Campaign finance hearings conducted under authority of KRS Chapter 121
- (k) State universities and colleges
 - 1. Student suspension and expulsion hearings conducted under authority of KRS Chapter 164
 - 2. University presidents and faculty removal hearings conducted under authority of KRS Chapter 164
 - 3. Campus residency hearings conducted under authority of KRS Chapter 164
 - 4. Family Education Rights to Privacy Act hearings conducted under authority of 20 U.S.C. sec. 1232 and 34 C.F.R. sec. 99
 - 5. Federal Health Care Quality Improvement Act of 1986 hearings conducted under authority of 42 U.S.C. sec. 11101 to 11115 and KRS Chapter 311.
- (4) Any administrative hearing, or portion thereof, may be certified as exempt by the Attorney General based on the following criteria:

- (a) The provisions of this chapter conflict with any provision of federal law or regulation with which the agency must comply, or with any federal law or regulation with which the agency must comply to permit the agency or persons within the Commonwealth to receive federal tax benefits or federal funds or other benefits;
 - (b) Conformity with the requirement of this chapter from which exemption is sought would be so unreasonable or so impractical as to deny due process because of undue delay in the conduct of administrative hearings; or
 - (c) The hearing procedures represent informal proceedings which are the preliminary stages or the review stages of a multilevel hearing process, if the provisions of this chapter or the provisions of a substantially equivalent hearing procedure exempted under subsection (3) of this section are applied at some level within the multilevel process.
- (5) The Attorney General shall not exempt an agency from any requirement of this chapter until the agency establishes alternative procedures by administrative regulation which, insofar as practical, shall be consistent with the intent and purpose of this chapter. When regulations for alternative procedures are submitted to the Administrative Regulation Review Subcommittee, they shall be accompanied by the request for exemption and the approval of exemption from the Attorney General. The decision of the Attorney General, whether affirmative or negative, shall be subject to judicial review in the Franklin Circuit Court within thirty (30) days of the date of issuance. The court shall not overturn a decision of the Attorney General unless the decision was arbitrary or capricious or contrary to law.
- (6) Except to the extent precluded by another provision of law, a person may waive any procedural right conferred upon that person by this chapter.

13B.030 Powers of agency head -- Hearing officers.

- (1) An agency head may exercise all powers conferred on an agency relating to the conduct of administrative hearings, and he may delegate conferred powers to a hearing officer or a member of a collegial body that serves as an agency head, or he may delegate conferred powers to a hearing officer to conduct an administrative hearing before a hearing panel, reserving the authority to render a recommended order to that panel. An agency head may not, however, delegate the power to issue a final order unless specifically authorized by statute, or unless disqualified in accordance with KRS 13B.040(2).
- (2) (a) In securing hearing officers as necessary to conduct administrative hearings under the jurisdiction of the agency, an agency may:
- 1. Employ hearing officers;
 - 2. Contract with another agency for hearing officers; or
 - 3. Contract with private attorneys through personal service contract.
- (b) An agency may secure hearing officers pursuant to subsection (2)(a)3. of this section only if the Attorney General has first determined that the Attorney General's Office cannot provide the needed hearing officers to

the agency. If the Attorney General determines that the Attorney General's Office can provide the needed hearing officers to the agency, the agency shall use the hearing officers provided by the Attorney General's Office. The expenses incurred by the Attorney General's Office in providing the hearing officers to the agency shall be paid to the Attorney General's Office by the agency in the following manner:

1. The amount to be paid by the agency to the Attorney General's Office shall be established by vouchers submitted by the Attorney General's Office to the agency which shall be promptly paid by the agency, at the beginning of, at the end of, or at any time during the provision of the hearing officers by the Attorney General's Office.
 2. The expenses to be paid to the Attorney General's Office shall be calculated according to the amount of time spent by the salaried hearing officers of the Attorney General's Office in providing the services. The charge for time spent shall not exceed twenty-five percent (25%) more than the amount allowed for a sole practitioner under personal service contract. The Attorney General may require payment in advance of the provision of the requested services based on his calculation of the amount of time that will be spent by the salaried hearing officers of the Attorney General's Office in providing the services. The agency shall be reimbursed for any overpayment at the conclusion of the provision of services by the Attorney General's Office.
- (3) A hearing officer shall possess and meet qualifications as the Personnel Cabinet and the employing agency, with the advice of the division, may find necessary to assure competency in the conduct of an administrative hearing. The qualifications in this subsection shall not, however, apply to a member of a board, commission, or other collegial body who may serve as a hearing officer in his capacity as a member of the collegial body.
- (4) All hearing officers, including members of collegial bodies who serve as hearing officers, shall receive training necessary to prepare them to conduct a competent administrative hearing. The training shall pertain to the conduct of administrative hearings generally and to the applications of the provisions of this chapter, specifically. The division shall establish by administrative regulation minimum standards concerning the length of training, course content, and instructor qualifications. Required training shall not exceed eighteen (18) classroom hours for initial training and six (6) classroom hours per year for continuing training. Actual training may be conducted by an agency or any other organization, if the training program offered has been approved by the division as meeting minimum standards.

13B.040 Qualifications of hearing officer.

- (1) A person who has served as an investigator or prosecutor in an administrative hearing or in its preadjudicative stage shall not serve as hearing officer or assist or advise a hearing officer in the same proceeding. This shall not be construed as preventing a person who has participated as a hearing officer in

a determination of probable cause or other equivalent preliminary determination from serving as a hearing officer in the same proceeding.

- (2) (a) A hearing officer, agency head, or member of an agency head who is serving as a hearing officer shall voluntarily disqualify himself and withdraw from any case in which he cannot afford a fair and impartial hearing or consideration. Any party may request the disqualification of a hearing officer, agency head, or member of the agency head by filing an affidavit, upon discovery of facts establishing grounds for a disqualification, stating the particular grounds upon which he claims that a fair and impartial hearing cannot be accorded. A request for the disqualification of a hearing officer shall be answered by the agency head within sixty (60) days of its filing. The request for disqualification and the disposition of the request shall be a part of the official record of the proceeding. Requests for disqualification of a hearing officer shall be determined by the agency head. Requests for disqualification of a hearing officer who is a member of the agency head shall be determined by the majority of the remaining members of the agency head.
- (b) Grounds for disqualification of a hearing officer shall include, but shall not be limited to, the following:
1. Serving as an investigator or prosecutor in the proceeding or the preadjudicative stages of the proceeding;
 2. Participating in an ex parte communication which would prejudice the proceedings;
 3. Having a pecuniary interest in the outcome of the proceeding; or
 4. Having a personal bias toward any party to a proceeding which would cause a prejudgment on the outcome of the proceeding.

34 C.F.R. Section 300.508 also requires that a hearing officer not be employed by KDE or the LEA that is involved in the education and care of the child. A person who is otherwise qualified to conduct a hearing is not an employee of KDE or the LEA solely because he or she is paid by KDE or the LEA to serve as a hearing officer. KDE will keep a list of the persons who serve as hearing officers and a statement of the qualification of each of those persons.

13B.050 Notice of administrative hearing.

- (1) In any administrative hearing, the agency shall conduct the hearing as soon as practicable and shall give notice of the hearing to the parties not less than twenty (20) days in advance of the date set for the hearing, unless otherwise required by federal law. An agency shall make reasonable effort to schedule a hearing on a date that is convenient to the parties involved.
- (2) The notice required by subsection (1) of this section shall be served on the parties by certified mail, return receipt requested, sent to the last known address of the parties, or by personal service, with the exception of notices of Personnel Board hearings and all board orders which may be served by first-class mail. Service by certified mail shall be complete upon the date on which the agency receives the return receipt or the returned notice.

- (3) The notice required by this section shall be in plain language and shall include:
- (a) A statement of the date, time, place, and nature of the hearing;
 - (b) The name, official title, and mailing address of the hearing officer;
 - (c) The names, official titles, mailing addresses, and, if available, telephone numbers of all parties to the hearing, including the counsel or representative of the agency;
 - (d) A statement of the factual basis for the agency action along with a statement of issues involved, in sufficient detail to give the parties reasonable opportunity to prepare evidence and argument;
 - (e) A reference to the specific statutes and administrative regulations which relate to the issues involved and the procedure to be followed in the hearing;
 - (f) A statement advising the person of his right to legal counsel;
34 C.F.R. Section 300.507 requires the LEA to inform the parent of any free or low-cost legal and other relevant services available in the area if the parent requests the information or when a hearing is initiated by the parent or the LEA. Additionally, 34 C.F.R. Section 300.509 (a)(1) states that any party to a hearing has a right to "be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities."
 - (g) A statement of the parties' right to examine, at least five (5) days prior to the hearing, a list of witnesses the parties expect to call at the hearing, any evidence to be used at the hearing and any exculpatory information in the agency's possession; and
34 C.F.R. Section 300.509 (a)(3) states that any party to the hearing has a right to "prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least 5 business days before the hearing." 34 C.F.R. Section 300.509 (b) states that "(1) at least 5 business days prior to a hearing, each party shall disclose to all other parties all evaluations completed by that date and recommendations on the offering party's evaluations that the party intends to use at the hearing. (2) A hearing officer may bar any party that fails to comply with (b) (1) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party."
 - (h) A statement advising that any party who fails to attend or participate as required at any stage of the administrative hearing process may be held in default under this chapter.
- (4) If an agency decides not to conduct an administrative hearing in response to a petition, the agency shall notify the petitioner of its decision in writing, with a brief statement of the agency's reasons and any administrative review available to the petitioner.

13B.060 Petition for intervention.

- (1) The hearing officer shall grant a petition for intervention if:

- (a) The petitioner has a statutory right to initiate the proceeding in which he wishes to intervene; or
 - (b) The petitioner has an interest which is or may be adversely affected by the outcome of the proceeding.
- (2) The hearing officer may grant intervention after consideration of the following factors and a determination that intervention is in the interests of justice:
 - (a) The nature of the issues;
 - (b) The adequacy of representation of the petitioner's interest which is provided by the existing parties to the proceeding;
 - (c) The ability of the petitioner to present relevant evidence and argument; and
 - (d) The effect of intervention on the agency's ability to implement its statutory mandate.
- (3) Unless otherwise required by federal law, a petition for intervention shall be filed and copies mailed to all parties named in the notice of the hearing, at least fourteen (14) days before the hearing. The parties to the hearing shall have seven (7) days within which to file any response they may have to the petition to intervene. If a petitioner qualifies for intervention under subsection (2) of this section, the hearing officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:
 - (a) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;
 - (b) Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and
 - (c) Requiring two (2) or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings.
- (4) The hearing officer, at least three (3) days before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The hearing officer shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

13B.070 Prehearing conference -- Mediation and informal settlement procedures.

- (1) A hearing officer may convene and conduct a prehearing conference upon reasonable notice to all parties to explore jurisdictional matters, mediation and settlement possibilities, preparation of stipulations, clarification of issues, rulings on witnesses, taking of evidence, issuance of subpoenas and orders, and other matters that will promote the orderly and prompt conduct of the hearing.
- (2) Upon conclusion of a prehearing conference, the hearing officer shall issue a prehearing order incorporating all matters determined at the prehearing conference. If a prehearing conference is not held, the hearing officer may

issue a prehearing order, based on the pleadings, to regulate the conduct of the hearing.

- (3) Except to the extent precluded by another provision of law, mediation or informal settlement of matters that may make unnecessary more elaborate proceedings under this chapter is encouraged. Agencies that employ informal settlement procedures shall establish by administrative regulation the specific procedures to be used. This subsection shall not be construed, however, as requiring any party to settle a matter pursuant to informal procedures when the right to an administrative hearing is conferred.

13B.080 Conduct of hearing.

- (1) A hearing officer shall preside over the conduct of an administrative hearing and shall regulate the course of the proceedings in a manner which will promote the orderly and prompt conduct of the hearing. When a prehearing order has been issued, the hearing officer shall regulate the hearing in conformity with the prehearing order.
- (2) The hearing officer, at appropriate stages of the proceedings, shall give all parties full opportunity to file pleadings, motions, objections, and offers of settlement. The hearing officer, at appropriate stages of the proceedings, may give all parties full opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed recommended or final orders. The original of all filings shall be mailed to the agency, and copies of any filed item shall be served on all parties and the hearing officer by mail or any other means permitted by law or prescribed by agency administrative regulation. The agency shall when it is received stamp the time and date upon a document.
- (3) The hearing officer may issue subpoenas and discovery orders when requested by a party or on his own volition. When a subpoena is disobeyed, any party may apply to the Circuit Court of the judicial circuit in which the administrative hearing is held for an order requiring obedience. Failure to comply with an order of the court shall be cause for punishment as a contempt of the court.
- (4) To the extent necessary for the full disclosure of all relevant facts and issues, the hearing officer shall afford all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by limited grant of intervention or a prehearing order.
- (5) Any party to an administrative hearing may participate in person or be represented by counsel. In informal proceedings, a party may be represented by other professionals if appropriate and if permitted by the agency by administrative regulation.

34 C.F.R. Section 300.509 (c)(1) states the "parents involved in the hearing have the right to have the child who is the subject of the hearing present and to have the hearing open to the public." (c)(2) states that "the record of the hearing and the finding of fact and decisions...must be provided at no cost to parents."

- (6) If a party properly served under KRS 13B.050 fails to attend or participate in a prehearing conference, hearing, or other stage of the administrative hearing process, or fails to comply with the orders of a hearing officer, the hearing officer may adjourn the proceedings and issue a default order granting or denying relief as appropriate, or may conduct the proceedings without the participation of the defaulting party, having due regard for the interests of justice and the orderly and prompt conduct of the proceedings. A default order shall be considered a recommended order and shall be processed as provided in KRS 13B.110.
- (7) A hearing officer may conduct all or part of an administrative hearing, or a prehearing conference, by telephone, television, or other electronic means, if each party to the hearing has an opportunity to hear, and, if technically feasible, to see the entire proceeding as it occurs, and if each party agrees.
- (8) An administrative hearing shall be open to the public unless specifically closed pursuant to a provision of law. If an administrative hearing is conducted by telephone, television, or other electronic means, and is not closed, public access shall be satisfied by giving the public an opportunity, at reasonable times, to hear or inspect the agency's record.

13B.090 Findings of fact -- Evidence -- Recording of hearing -- Burdens of proof.

- (1) In an administrative hearing, findings of fact shall be based exclusively on the evidence on the record. The hearing officer shall exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this Commonwealth. Hearsay evidence may be admissible, if it is the type of evidence that reasonable and prudent persons would rely on in their daily affairs, but it shall not be sufficient in itself to support an agency's findings of facts unless it would be admissible over objections in civil actions.
- (2) All testimony shall be made under oath or affirmation. Any part of the evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to the interests of any party. The hearing officer may make a recommended order in an administrative hearing submitted in written form if the hearing officer determines there are no genuine issues of material fact in dispute and judgment is appropriate as a matter of law.
- (3) Any party shall have the right to inspect, at least five (5) days prior to the hearing, a list of all witnesses every other party expects to call at the hearing, and the available documentary or tangible evidence relating to an administrative hearing either in person or by counsel. Copies of documentary evidence may be obtained upon the payment of a fee, except documents protected from disclosure by state or federal law. Nothing in this section shall be construed as giving a party the right to examine or copy the personal notes, observations, or conclusions of the agency staff, unless exculpatory in nature, nor shall it be construed as allowing access to the work product of counsel for the agency. Conditions for examining and copying agency records, fees to be charged, and other matters pertaining to access to these

records shall be governed by KRS 61.870 to 61.884. To the extent required by due process, the hearing officer may order the inspection of any records excluded from the application of KRS 61.870 to 61.884 under KRS 61.878 that relate to an act, transaction, or event that is a subject of the hearing, and may order their inclusion in the record under seal.

- (4) Objections to evidentiary offers may be made by any party and shall be noted in the record.
- (5) The hearing officer may take official notice of facts which are not in dispute, or of generally-recognized technical or scientific facts within the agency's specialized knowledge. The hearing officer shall notify all parties, either before or during the hearing, or in preliminary reports or otherwise, of any facts so noticed and their source. All parties shall be given an opportunity to contest facts officially noticed.
- (6) The agency shall cause all testimony, motions, and objections in a hearing to be accurately and completely recorded. Any person, upon request, may receive a copy of the recording or a copy of the transcript, if the hearing has been transcribed, at the discretion of the agency, unless the hearing is closed by law. The agency may prepare a transcript of a hearing or a portion of a hearing upon request but the party making the request shall be responsible for the transcription costs. The form of all requests and fees charged shall be consistent with KRS 61.870 to 61.884.

34 C.F.R. Section 300.509 (a)(4) and (5) requires that any party to a hearing has a right to "obtain a written, or, at the option of the parents, electronic, verbatim record of the hearing and obtain written, or, at the option of the parents, electronic findings of fact and decisions." 34 C.F.R. Section 300.509 (c)(2) also states that the parents have a right to have copies of the record of the hearing and findings of fact and decisions described above at no cost.

- (7) In all administrative hearings, unless otherwise provided by statute or federal law, the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought. The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted. The party asserting an affirmative defense has the burden to establish that defense. The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer.

13B.100 Prohibited communications.

- (1) Unless required for the disposition of ex parte matters specifically authorized by statute, a hearing officer shall not communicate off the record with any party to the hearing or any other person who has a direct or indirect interest in

the outcome of the hearing, concerning any substantive issue, while the proceeding is pending.

- (2) The prohibition stated in subsection (1) shall not apply to:
 - (a) Communication with other agency staff, if the communication is not an ex parte communication received by staff; and
 - (b) Communication among members of a collegial body or panel which by law is serving as a hearing officer.
- (3) If an ex parte communication occurs, the hearing officer shall note the occurrence for the record, and he shall place in the record a copy of the communication, if it was written, or a memorandum of the substance of the communication, if it was oral.

Pursuant to KRS 157.224 (6) the decision of a hearing officer in hearings under 707 KAR 1:340, Section 5 and 7 shall be a final order and the timelines contained in federal regulations shall be followed. Therefore, KRS 13B.110 and 120 will not be applicable to due process hearings conducted under 707 KAR 1:340. In their place, the following federal regulations will be followed.

34 C.F.R. Section 510 states that (a) decision made in a hearing is final, except that any party involved in the hearing may appeal the decision pursuant to 707 KAR 1:340, Section 8. The Exceptional Children Appeals Board (ECAB) shall conduct an impartial review of the hearing. The ECAB, in conducting the review, shall examine the entire hearing record, ensure that the procedures at the hearing were consistent with the requirements of due process, seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in KRS 13B and IDEA apply. The ECAB shall; afford the parties an opportunity for oral or written argument, or both, at the discretion of the ECAB; make an independent decision on completion of the review; and give a copy of the written, or, at the option of the parents, electronic findings of fact and decisions to the parties.

KDE, after deleting any personally identifiable information, shall transmit the findings and decisions to the state advisory panel established, and make those findings and decisions available to the public.

The decision made by the ECAB is final unless a party brings a civil action under 34 C.F.R. Section 300.512.

34 C.F.R. Section 300.511 states that KDE shall ensure that not later than 45 days after the receipt of a request for a hearing a final decision is reached in the hearing, and a copy of the decision is mailed to each of the parties. KDE shall ensure that not later than 30 days after the receipt of a request for a review a final decision is reached in the review, and a copy of the decision is mailed to each of the parties. The hearing officer or ECAB, respectfully, may grant specific extensions of time beyond the periods set out above at the request of either party or on their own motion. Each hearing and each review by ECAB involving oral

arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved.

13B.110 Recommended order.

- (1) Except when a shorter time period is provided by law, the hearing officer shall complete and submit to the agency head, no later than sixty (60) days after receiving a copy of the official record of the proceeding, a written recommended order which shall include his findings of fact, conclusion of law, and recommended disposition of the hearing, including recommended penalties, if any. The recommended order shall also include a statement advising parties fully of their exception and appeal rights.
- (2) If an extension of time is needed by the hearing officer to complete and submit his recommended order to the agency head, the hearing officer shall show good cause to the agency head, in writing, and based upon substantial proof, that an extension of time is needed.
- (3) If the agency head, after a showing of good cause, grants the hearing officer an extension of time:
 - (a) The extension shall not exceed thirty (30) days from the date the extension was granted;
 - (b) The statement granting the extension shall be included in the record of the hearing; and
 - (c) Notice of the extension shall be sent to all parties.
- (4) A copy of the hearing officer's recommended order shall also be sent to each party in the hearing and each party shall have fifteen (15) days from the date the recommended order is mailed within which to file exceptions to the recommendations with the agency head. Transmittal of a recommended order may be sent by regular mail to the last known address of the party.
- (5) The provisions of this section shall not apply in an administrative hearing where the hearing officer conducts the hearing in the presence of the agency head who renders a decision without the recommendation of the hearing officer.

13B.120 Final order.

- (1) In making the final order, the agency head shall consider the record including the recommended order and any exceptions duly filed to a recommended order.
- (2) The agency head may accept the recommended order of the hearing officer and adopt it as the agency's final order, or it may reject or modify, in whole or in part, the recommended order, or it may remand the matter, in whole or in part, to the hearing officer for further proceedings as appropriate.
- (3) The final order in an administrative hearing shall be in writing and stated in the record. If the final order differs from the recommended order, it shall include separate statements of findings of fact and conclusions of law. The final order shall also include the effective date of the order and a statement advising parties fully of available appeal rights.

- (4) Except as otherwise required by federal law, the agency head shall render a final order in an administrative hearing within ninety (90) days after:
 - (a) The receipt of the official record of the hearing in which there was no hearing officer submitting a recommended order under KRS 13B.110; or
 - (b) The hearing officer submits a recommended order to the agency head, unless the matter is remanded to the hearing officer for further proceedings.
- (5) Unless waived by the party, a copy of the final order shall be transmitted to each party or to his attorney of record in the same manner as provided in KRS 13B.050.
- (6) This section shall not apply to disposition pursuant to KRS 13B.070(3).
- (7) If, pursuant to statute, an agency may review the final order of another agency, the review is deemed to be a continuous proceeding as if before a single agency. The final order of the first agency is treated as a recommended order and the second agency functions as though it were reviewing a recommended order in accordance with this section.

13B.125 Emergency action -- Hearing -- Appeal.

- (1) An agency may take emergency action affecting the legal rights, duties, privileges or immunities of named persons without a hearing only if duly authorized by statute to so act. If an agency takes emergency action, the agency shall conduct an emergency hearing in accordance with the provisions of this section.
- (2) An agency head or an official of an agency duly authorized by law to summarily act in emergency situations may issue an emergency order to stop, prevent, or avoid an immediate danger to the public health, safety, or welfare. The emergency order shall contain findings of fact and conclusions of law upon which the agency bases the emergency order. The agency shall give notice of the emergency order to all affected parties as is practicable under the circumstances, and notice shall be served in the same manner as provided in KRS 13B.050(2). The emergency order is effective when received by the affected party or his representative.
- (3) Any person required to comply with an emergency order issued under subsection (2) of this section may request an emergency hearing to determine the propriety of the order. The agency shall conduct an emergency hearing within ten (10) working days of the request for hearing. The agency shall give all affected parties reasonable notice of the hearing and to the extent practicable shall conduct the hearing in conformity with this chapter. The hearing on the emergency order may be conducted by a hearing officer qualified in accordance with KRS 13B.040. Within five (5) working days of completion of the hearing, the agency or hearing officer shall render a written decision affirming, modifying, or revoking the emergency order. The emergency order shall be affirmed if there is substantial evidence of a violation of law which constitutes an immediate danger to the public health, safety, or welfare.

- (4) The decision rendered under subsection (3) of this section shall be a final order of the agency on the matter, and any party aggrieved by the decision may appeal to Circuit Court in the same manner as provided in KRS 13B.140.

13B.130 Official record of hearing.

In each administrative hearing, an agency shall keep an official record of the proceedings which shall consist of:

- (1) All notices, pleadings, motions, and intermediate rulings;
- (2) Any prehearing orders;
- (3) Evidence received and considered;
- (4) A statement of matters officially noticed;
- (5) Proffers of proof and objections and rulings thereon;
- (6) Proposed findings, requested orders, and exemptions;
- (7) A copy of the recommended order, exceptions filed to the recommended order, and a copy of the final order;
- (8) All requests by the hearing officer for an extension of time, and the response of the agency head;
- (9) Ex parte communications placed upon the record by the hearing officer; and
- (10) A recording or transcript of the proceedings.

13B.140 Judicial review of final order.

- (1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.
- (2) A party may file a petition for judicial review only after the party has exhausted all administrative remedies available within the agency whose action is being challenged, and within any other agency authorized to exercise administrative review.
- (3) Within twenty (20) days after the service of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the official record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. The court may require or permit subsequent correction or additions to the official record. If the court requests a transcript of proceedings that have not been transcribed, the cost of the transcription shall be paid by the party initiating the appeal, unless otherwise agreed to by all parties.

(4) A petition for judicial review shall not automatically stay a final order pending the outcome of the review, unless:

- (a) An automatic stay is provided by statute upon appeal or at any point in the administrative proceedings;
- (b) A stay is permitted by the agency and granted upon request; or
- (c) A stay is ordered by the Circuit Court of jurisdiction upon petition.

34 C.F.R. Section 300.512 states that any party aggrieved by the findings and decisions of the ECAB has the right to bring a civil action with respect to the issues raised initially at the hearing. The action may be brought in state circuit court or in a district court of the United States without regard to the amount in controversy. The court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence, shall grant the relief that the court determines to be appropriate.

13B.150 Conduct of judicial review.

- (1) Review of a final order shall be conducted by the court without a jury and shall be confined to the record, unless there is fraud or misconduct involving a party engaged in administration of this chapter. The court, upon request, may hear oral argument and receive written briefs.
- (2) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:
 - (a) In violation of constitutional or statutory provisions;
 - (b) In excess of the statutory authority of the agency;
 - (c) Without support of substantial evidence on the whole record;
 - (d) Arbitrary, capricious, or characterized by abuse of discretion;
 - (e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;
 - (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or
 - (g) Deficient as otherwise provided by law.

13B.160 Judicial appeal.

Any aggrieved party may appeal any final judgment of the Circuit Court under this chapter to the Court of Appeals in accordance with the Kentucky Rules of Civil Procedure.

13B.170 Administrative regulations.

- (1) An agency shall have authority to promulgate administrative regulations that are necessary to carry out the provisions of this chapter.
- (2) Nothing in this chapter shall be construed to prohibit an agency from enacting administrative hearing procedures by administrative regulations which are supplemental to the provisions of this chapter. (34 C.F.R. 300.507-.513)

34 C.F.R. Section 300.513 states that in any action or proceeding brought under section 615 of IDEA, the court, in its discretion, may award reasonable attorneys' fees as part of the cost to the parents of a child with a disability who is the prevailing party. Funds under Part B of IDEA may not be used to pay attorneys' fees or costs of a party related to an action or proceeding under section 615 of IDEA and subpart E of the federal regulations. A LEA or KDE are not precluded from using funds from Part B of IDEA for conducting an action or proceeding under section 615 of IDEA.

A court award of attorneys' fees must be consistent with the following: 1) fees must be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished and no bonus or multiplier may be used in calculating the fees awarded; 2) fees may not be awarded and related costs may not be reimbursed in any action or proceeding under section 615 of IDEA for services performed subsequent to the time of a written offer of settlement to a parent if the offer was made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure, or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins, the offer is not accepted within 10 days and the court or hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement. Attorneys' fees may not be awarded relating to any meeting of the IEP team unless the meeting is convened as a result of an administrative proceeding or judicial action. An award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

Except in situations in which the court finds that KDE or the LEA unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of IDEA, the court reduces the amount of attorneys' fees awarded, if the court finds that: 1) the parent, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy; 2) the amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience; 3) the time spent and legal services furnished were excessive considering the nature of the action or proceeding, or 4) the attorney representing the parent did not provide to the LEA the appropriate information in the request for the due process hearing in accordance with 707 KAR 1:340, Section 7 and 16.

Expedited due process hearings

In addition to the procedures detailed above, KDE will maintain a system to offer an expedited due process hearing to parties appropriately requesting an expedited due process hearing under 707 KAR 1:340. KDE will use the same list of hearing officers used in regular due process hearings. In accordance with 34 C.F.R. 300.528, all hearing rights afforded the parties in regular due process hearings will apply except the following: 1) there will be a two business day limit

on disclosure of evidence to the other party prior to the hearing; 2) there will be a two business day limit on disclosure of evaluations and recommendations based on those evaluations to the other party prior to the hearing; 3) a written decision must be mailed to the parties within 45 days of KDE's receipt of the request for an expedited due process hearing; and 4) this 45 day time limit shall apply whether the request was made by the parents or the LEA.

Decisions from expedited due process hearings may be appealed in the same manner as decisions from regular due process hearings. (34 C.F.R. 300.528)

Notice to parents

KDE will give notice that is adequate to fully inform parents about the requirements of the procedures KDE and LEAs will undertake to ensure protection of the confidentiality of any personally identifiable information collected, used, or maintained under IDEA and 707 KAR Chapter 1. This notice will include:

- 1) a description of the extent that the notice is given in the native languages of the various population groups in the state;
- 2) a description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the state intends to use in gathering information (including the sources from whom information is gathered), and the uses to be made of the information;
- 3) a summary of the policies and procedures that LEAs must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and
- 4) a description of all of the rights of parents and children regarding this information, including the rights under the Family Educational Rights and Privacy Act (FERPA).

This notice will be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the state of the activity prior to any major identification, location, or evaluation activity. (34 C.F.R. 300.561)

Adoption of state complaint procedures. Minimum state complaint procedures. Filing a complaint.

KDE will use the following procedures to implement the state formal complaint process, this procedure will be widely disseminated to parents and other interested individuals.

Federal statute requires procedures to be in place for KDE, to conduct investigations of a signed written complaint alleging a violation of the Individuals with Disabilities Education Act (IDEA), Part B. Federal regulations state that a complaint may be filed by anyone, including an organization or an individual from another state. The following are complaint procedures for Kentucky.

Operational Plans

The formal complaint letter is stamped in with the date it is received by the Kentucky Department of Education (KDE), Division of Exceptional Children Services (DECS). The sixty (60) calendar day timeline will be determined from the date the DECS received the complaint. In the event of exceptional circumstances, the DECS Director may arrange for an extension to the 60-day timeline for the resolution of the complaint.

The appropriate branch manager will determine if the complaint meets the federal definition of a complaint pursuant to 34 CFR 300.660 to 662 and 707 KAR 1:340, Section 15. The branch manager will assign the complaint to a branch consultant who will act as the lead consultant. The complaint must include a statement that the school district has violated a requirement of Part B of IDEA and the facts on which the statement is based. The complaint must allege a violation that occurred not more than one year prior to the date the complaint is received by KDE unless a longer period is reasonable because the violation is continuing, or the complaint is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received by KDE.

If a written complaint is received that is also the subject of a due process hearing or contains multiple issues, of which one or more are part of that hearing, KDE must set aside any part of the complaint that is being addressed in the due process hearing, until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process hearing must be resolved utilizing KDE complaint procedures. If an issue is raised in a complaint that had previously been decided in a due process hearing and involves the same parties, the hearing decision is binding and KDE will inform the parties to that effect. A complaint alleging failure to implement a due process decision must be resolved by KDE.

Upon receipt of the written complaint, DECS will send a letter to the district's superintendent outlining the complaint timelines and response required by the district. Copies of the formal complaint and KDE letters will be sent to the Regional Exceptional Children Consultant (RECC), the complainant, the local Director of Special Education (DOSE), and the child's parent(s).

According to 34 CFR 300.660 (a)(ii), the district may resolve the complaint without formal investigation by KDE. If the district conducts its own investigation, KDE will maintain the right to review the district's decision on the complaint. Within five (5) business days of receipt of the complaint notification, the district should notify KDE if it intends to conduct its own investigation. The investigation could include parent and/or district staff interviews, review of records, or other investigatory activities that will lead to resolution of the issues. The district should allow the complainant the opportunity to submit additional information, either orally or in writing, about the allegations. After the district has completed its investigation, a written decision, which addresses all the issues, should be sent to the complainant and forwarded to KDE.

The lead consultant assigned will review all of the submitted documentation and pursuant to federal regulation (34 CFR 300.661), either accept it as a final resolution of the allegations or determine that further investigation is needed. If the district determines that it cannot investigate the complaint, KDE staff shall conduct an immediate investigation. The lead consultant will inform the complainant of the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint. The district should submit documentation to substantiate or refute the allegations. The consultant will review the response and documentation submitted by the district and the complainant. Additional documentation/information may be requested. The consultant will, at a minimum, conduct telephone interviews with district personnel and the complainant, or parent, as part of the investigatory process.

The lead consultant will decide whether an independent on-site visit is necessary. Criteria that may necessitate a visit includes:

- a. Complexity of the issues;
- b. A systemic complaint that requires the review of numerous individual student records;
- c. Personal interviews with parents, local education agency staff, or others are required;
- d. Professional judgment; or
- e. Failure of the district to submit adequate documentation.

If an on-site visit or interviews are necessary, the lead consultant will make arrangements for the visit.

The consultant will review all the evidence and prepare a written report that will address each allegation in the complaint; findings of fact and conclusions; the reasons for the final decision(s); and if necessary, suggestions for technical assistance, negotiations or a corrective action plan (CAP). Input from other KDE staff will be secured as needed. In resolving a complaint in which failure to provide appropriate services has been found, KDE must address at least two (2) items. They include: (1) how to remediate the denial of those services, including, as appropriate, the awarding or monetary reimbursement or other corrective action appropriate to the need of the student; and (2) appropriate future provision of services for all children with disabilities [34 CFR 300.660 (b) (1) (2)]. The report, under the signature of the DECS director, will be sent to the Superintendent, the Director of Special Education, the RECC, the complainant, and the parents, as applicable. **If the complainant is not authorized to represent the student/parent, a copy of the report will not be sent to the complainant.** The complainant, parent, or the district shall have the right to appeal the written decision from a complaint to the Commissioner of the Kentucky Department of Education. This appeal shall be filed within fifteen (15) business days of the receipt of the decision [707 KAR 1:340, Section 15. (4)]

The lead consultant will monitor the timeline for the CAP. In the event there are exceptional circumstances, the lead consultant, in conjunction with the branch manager, may arrange for an extension of the CAP timeline. Upon successful completion of the CAP, a letter, under the signature of the DECS director, will be sent to the Superintendent, the Director of Special Education, the RECC, the complainant, and the parents closing the CAP.

All documentation used in the investigation is maintained in KDE files for one calendar year from the date of the report, or until the CAP is closed. The complainant letter, correspondence with the district and the complainant, the report of findings, a copy of the CAP, and the final action letter are maintained permanently.

Additional Operational Plans

A complaint, which is substantially modified or amended by the complainant subsequent to its acknowledgment, shall be deemed a new complaint for the purpose of computing the permissible timelines. (During the complaint investigation, if additional substantial violations, beyond the original complaint issues are identified, the district will be notified.)

A statement must accompany complaints submitted by an advocate regarding a specific child from the parent/guardian authorizing the advocate to act in their behalf if the advocate is to receive a copy of the report of findings. Attorney's fees will **not** be awarded for either party using the complaint procedures.

All complaint documentation is maintained in a locked cabinet and is considered confidential information.

All complaints alleging child abuse shall be immediately reported to the Department of Social Services (DSS) Hotline (800) 752-6200 pursuant to KRS 620.030. The complaint will be logged and the following data recorded:

- Name of the complainant
- Description/nature of the abuse
- Date of the referral to DSS

Complaints dealing with building accessibility and Section 504 of the Rehabilitation Act of 1973 may be referred to:

- U.S. Department of Education, Office of Civil Rights
- The Wanamaker Building, Suite 515
- 100 Penn Square East
- Philadelphia, Pennsylvania 19107
- Telephone: (215) 656-8541
- TTY: (215) 656-8605
- Fax: (215) 656-8604

All complaints alleging violations by the Kentucky Department of Education of state and federal regulations may be referred to:

Office of Special Education Programs (OSEP)

Room 3624-Switzer Building

330 C Street SW

Washington, DC 20202